Filed 2/19/09 D.A. and J.L. v. Superior Court CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

D.A. and J.L.,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES AGENCY et al.,

Real Parties in Interest.

G041179

(Super. Ct. No. DP014793)

O P I N I O N

Original proceeding; petitions for a writ of mandate to challenge an order of the Superior Court of Orange County, Leslie Ann Flynn, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Requests to stay Welfare & Institutions Code section 366.26 hearing. Petitions denied. Requests for stay denied.

Donna P. Chirco for Petitioner D.A.

Deborah A. Kwast, Public Defender, Frank Ospino, Assistant Public Defender, Michael Perez and Paul T. DeQuattro, Deputy Public Defenders, for Petitioner J.L.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Real Party in Interest Orange County Social Services Agency.

Law Office of Harold LaFlamme; and Regan Dean Phillips for Real Party in Interest I.L.

* * *

Petitioners D.A. and J.L. challenge orders made at the 18-month review hearing terminating reunification services and setting a permanency hearing under Welfare and Institutions Code section 366.26 (all statutory references are to this code) on the grounds there was insufficient evidence their now three-year-old child, I.L., would be at risk if returned to their custody and they were not offered reasonable reunification services. Father also argues he should not be penalized for failing to provide evidence of attendance at a 12-step program because it was not a critical part of his drug treatment. Both real parties in interest oppose the petitions and we deny them.

FACTS

Orange County Social Services Agency (SSA) took then 16-month-old I.L. into custody after he and mother were injured in a car accident while father was driving. An interlineated petition, to which parents pleaded no contest, alleged failure to protect based on the presence of marijuana in father's blood, that mother should have known about, and that both had previously used marijuana and never successfully completed

rehabilitation. As part of their service plans parents were required to attend parenting classes and drug treatment programs, including random drug testing and participation in Alcoholics Anonymous/Narcotics Anonymous (AA/NA), providing proof of attendance. Liberal supervised visitation had previously been ordered and was included in the plan.

At interviews with the social worker prior to the detention and jurisdiction/disposition hearings, mother stated she had not used marijuana for at least six months and denied father had been under the influence of alcohol or illegal drugs on the day of the accident.

The status report for the six-month hearing showed mother did not qualify for the drug program SSA had arranged because she denied she had used drugs for the past two years. Additionally, she did not attend an assessment at another program she had been referred to. Father did not attend any drug counseling sessions following his initial assessment. Both parents stopped drug testing several months before the hearing.

The report for the 12-month review hearing stated mother was working and had completed a parenting class. She was doing well in a substance abuse program and was taking methadone. She was required to attend one individual counseling session per month and had been complying. Her twice a week drug tests had all been negative. However she was not attending her 12-step program as required.

Father reported he and mother were living separately because they could not maintain sobriety together. Also taking methadone, father had tested positive in four drug tests. He too was not attending his required 12-step program.

Father's visitation remained monitored because of his lack of progress in drug treatment. Although mother otherwise could have had unsupervised visitation it was not allowed because she could not guarantee she would not let father attend, lacking the will power to prevent it.

Before the 18-month review hearing mother was finally given unsupervised visitation over a weekend. According to parents, at that time they were staying at two

different motels. The foster mother advised SSA that the child told her that father had been present at the visit and gone swimming with him. During his monitored visit with father the child mentioned that he wanted to go swimming again with "daddy" and father replied no, you only went swimming with mother. Father told the monitor the child was "mixed up." On the second day of the visit with mother the foster mother could hear father's voice in the background during a telephone conversation with mother. The child again reported to foster mother he had been with both parents. The monitor checked with the motel where mother had said she was living and found father was registered there. When she questioned mother about it, mother started yelling and ultimately refused to speak to the social worker about it. Both parents continued to deny father's presence at mother's visits and father claimed the monitor was lying.

A few weeks later mother admitted they had lied about breaking up and living apart. She said father had lied to the monitor so she lied to cover for him. She said they thought she had a better chance of having the child returned to her if SSA and the court believed they had broken up because she had made more progress with her plan. She continued to deny father had been present during her unmonitored visits.

Parents stopped visiting the child two months prior to the hearing, explaining they thought they could not until its conclusion. Additionally, despite attempts to reach parents by telephone, letter, and e-mail during that time, the social worker received only one response from father; calls were not returned and a letter was sent back.

SSA recommended that services be terminated because parents had not made enough progress. The drug counselor had suggested they engage in additional therapy, and provided referrals, noting father was "manipulative" and "can work you over," but both were "resistant" to the idea and declined. Although the social worker had discussed it with them they saw no need for additional therapy. The social worker was concerned about father's lying and mother covering for him and that mother would do

what father wanted rather than what was best for the child. They had still not provided proof of attendance at AA/NA. And while mother was employed, father was not.

At the hearing the social worker testified that, although mother had made progress with her plan, she was opposed to returning the child to her. The child was removed from mother for failure to protect and mother was still protecting and covering for father instead of protecting the child, as evidenced by the lie about not being in the same hotel room. She also stated that mother and father both needed more counseling but were resistant to the idea; mother said she did not think she needed to change her life any further. The social worker was concerned about mother's admitted inability to keep father from the child during her unmonitored visits. In addition mother had never provided proof of attendance at AA/NA.

Father testified he had no drug problem until after the accident leading to the detention, at which time he became addicted to prescription painkillers. Mother also testified she had been attending NA meetings, although not for the past several months because she was too tired and too busy working. She additionally claimed she had shown some attendance cards to the social worker a few months ago but did not have them with her. She testified the child was detained not because of her drug or alcohol use but only because father had traces of drugs in his system; his use of drugs did not cause the accident. She had no drug problem until after the accident when she became addicted to prescription drugs. Although she had used marijuana in the past it had never been a problem.

When the social worker had asked her to participate in therapy other than drug counseling, she refused, thinking she did not need it and was "being stubborn." Now she was willing because it would help her relationship with father.

The court found a prima facie case of detriment based on the parents' failure to participate in the 12-step programs or to remedy the causes of the original detention. Despite clean drug tests and completion of the parenting class, the court found

returning the child to parents would create a substantial risk of harm to him. Neither substantiated attendance at a 12-step program, and mother testified she was too tired or too busy to attend. Although father claimed attendance and that he served as a sponsor, he could not identify any of the steps; the court found he was not credible on this issue.

In addition, even though parents knew they had to have drug counseling, the program they attended provided only minimal time and they refused to participate in any other programs. Although father claimed he attended a few sessions with a therapist it was insufficient and the explanation for his inability to prove his attendance was "questionable." Furthermore, it would not have satisfied the requirement.

Parents also failed to acknowledge that it was a drug abuse problem that caused the initial detention, instead blaming it on the car accident. Had parents actually been attending AA/NA they would have realized it was the substance abuse that led to the accident and put the child at risk. Further, although mother and father had completed a parenting class they "gained little insight into the true meaning of parenting . . .," "still unable to accept responsibility for the problems that caused them to lose custody of their [child]." The court also cited to their problematic participation in drug programs. While they denied drug dependence, both were using methadone.

There was evidence in several visitation reports of father's manipulation of mother. Additionally, based on evidence of his visits at his parents' home and the current caretaker, father had not dealt with his anger problems.

The court noted parents' failure to visit for the last three months and mother's inability to maintain unsupervised visits because of her lack of will power to keep father from visiting with her. The court determined reasonable services had been provided, noting, among other things, referrals to programs.

DISCUSSION

1. Substantial Evidence of Risk to Child

Mother asserts there was insufficient evidence to establish the child would be at risk if returned to her and father incorporates her argument. We disagree.

At the 18-month review hearing a child must be returned to his or her parents unless SSA shows by a preponderance of the evidence that return "would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.22, subd. (a).) "The failure of the parent . . . to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental." (*Ibid*.) Once a prima facie case has been made the burden shifts to the parent to rebut it. (*In re Heather B.* (1992) 9 Cal.App.4th 535, 560-562.) We review the court's ruling for sufficiency of the evidence, viewing the evidence in a light favorable to SSA and in support of the order. (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400-1401.) We do not reweigh evidence or reconsider the court's findings of credibility. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

SSA made a prima facie case by showing parents did not make sufficient progress in completing their programs. The reunification plan, which neither parent ever signed despite repeated requests, required they participate in AA/NA. They did not. Mother was too tired or too busy and although father claimed he had attended three times a week and was a sponsor, he never provided records of attendance and the court did not find him credible. Thus, father did not complete the core of his plan, drug rehabilitation.

Mother argues she made substantive progress in fulfilling her plan requirements. She points out that she completed a parenting class, participated in drug abuse program, and successfully tested twice a week for drugs. She also notes that she met with her drug counselor once a month and was progressing. Further, she had consistently been employed.

But even assuming mother complied with the technical plan requirements, the evidence supports the court's finding she did not address the root cause of her inability to properly parent her child. (*In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1142 [although mother "[a]vail[ed] herself of the services provided" and was "very close to having [her program] completed," she did not make progress "towards eliminating the conditions leading to the children's placement out of home"].) The same is true here.

Mother refused to ever acknowledge that it was father's use of drugs and driving while under the influence that caused the initial detention. This is substantial evidence she was not facing or addressing the condition that led to the child's removal from parents' custody.

Moreover, the record reflects mother was unable to deal with father's manipulative behavior, improperly allowing him to attend her unmonitored visit and then lying about it, putting his needs ahead of protecting the child. As counsel for the child points out, mother relinquished her right to unsupervised visitation because she could not guarantee she could refuse father's demand to attend. This shows minor would continue to be at risk if returned to the parents' custody and is sufficient evidence to support the court's ruling.

Father makes two additional claims as to sufficiency of the evidence. He asserts that SSA relied on inaccurate statements in the reports and on information in prior reports not admitted at the 18-month review hearing. He criticizes SSA's counsel questioning him "about the beginnings of the case," i.e., his drug use, that "challenged him to . . . remember details surrounding the accident," and statements SSA made in closing argument that the father had never acknowledged that his use of drugs had caused the accident and thus the detention of the child. He maintains that only the 18-month review report and two addenda went into evidence and argues SSA asked the court to rely on the detention report and then "impliedly represented" it contained facts to show father was under the influence at the time of the accident. He also contends SSA improperly

argued facts it had stipulated to delete from the petition, that father was "under the influence" to impeach father's testimony that he was not. This contention has several flaws.

First, father did not object to SSA's closing argument and thus has waived any claim. (*People v. Stanley* (2006) 39 Cal.4th 913, 953.) Second, although the interlineated petition, to which father pleaded no contest, deleted the allegation he was under the influence of drugs at the time of the accident, it did state "THC/Marijuana [was] in his blood," and that he "has used marijuana and . . . has no record of successful completion of a rehabilitation program." In addition, there was other evidence on which the court relied to terminate services and set the permanency hearing, including father's failure to participate in a 12-step program, failure to gain insight into parenting, and inconsistent visitation.

Father also argues that attending a 12-step program was only "a minor component" of his reunification plan and his failure to do so should not be considered lack of substantive progress on the plan. He claims that being on a methadone maintenance program is fundamentally incompatible with a 12-step program because he could not comply with one of the program's basic principles to be free of narcotics use. This argument fails.

Father agreed to attend AA/NA as part of his plan and never objected; thus he forfeited his right to argue the issue now. (*In re Richard K.* (1994) 25 Cal.App.4th 580, 590.) If in fact this is a legitimate argument it should have been raised in the trial court where it could have been evaluated. It is not our function to make such factual determinations. Further, father testified he had been attending his meetings three times per week and had given written proof to three different social workers. Although the court did not believe his testimony, it does illustrate that father did not believe it was incompatible with his methadone use.

2. Reunification Services

Mother claims she did not receive reasonable services and that the 18-month review hearing should have been continued so she could receive further services, particularly additional counseling. Father again incorporates her argument.

A court may extend services beyond 18 months "only under extraordinary circumstances 'involv[ing] some external factor which prevented the parent from participating in the case plan[]' [citation]" (*Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, 1510) or where there have been no reasonable services at all (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1017).

Much of mother's argument deals with substance abuse programs prior to the 12-month review hearing, and her claim she was not provided sufficient referrals to drug treatment programs, criticizing SSA's slow payment of fees and complaining she was unable to go to a clinic for a week. But at the 6- and 12-month review hearings both parents stipulated reasonable services had been provided. Thus, there is no basis to claim a lack of any reasonable services. And by stipulating to reasonable services parents "waived any right to challenge the [reunification] plans themselves[.]" (*In re Cody W.* (1994) 31 Cal.App.4th 221, 231.)

Mother also argues that if SSA believed she should have additional drug counseling it should have found a program and had her placed. But, as discussed above, that was not the basis for the court's finding the child should not be returned to mother. And there is no evidence mother was prevented from participating in services.

Moreover, there is substantial evidence reasonable services were provided. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 598.) SSA must tailor a reunification plan to fit the circumstances of the family in question and to eliminate the conditions leading to the juvenile dependency proceeding. (*In re Dino E.* (1992) 6 Cal.App.4th 1768, 1777.) "[I]n reviewing the reasonableness of the reunification services provided by the Department, . . . in most cases more services might have been

provided, and the services which are provided are often imperfect. The standard is not whether the services provided were the best that might have been provided, but whether they were reasonable under the circumstances. [Citation.]" (*Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969.)

SSA obtained referrals for drug treatment programs for parents. When it was recommended they participate in therapy in addition to substance abuse counseling, the social worker found a program for them. It was they who refused to participate. They also did not take advantage of the required 12-step programs, which would have helped them recognize and address the root cause of the dependency case. Reasonable services were provided.

DISPOSITION

The petitions and request for stay are denied.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.